SUMBANGAN ANEKA SDN BHD v. KNK DEVELOPMENT SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 02(f)-64-08-2019 (Q)]
26 APRIL 2021

CIVIL PROCEDURE: *Judgments and orders – Declaratory order – Plaintiff claimed for declaration that development agreement had expired/terminated – Plaintiff's pleaded case based on breach of contract – Whether plaintiff barred from seeking declaration of court – Specific Relief Act 1950, s. 41*

CIVIL PROCEDURE: *Documents – Rectification – Error in agreement – Whether mutual mistake – Whether party ought to take up separate action or separate suit for rectification – Whether court seized with jurisdiction to rectify instrument – Specific Relief Act 1950, s. 30*

The appellant ('plaintiff') was the registered proprietor of a parcel of land ('the land') while the first respondent ('first defendant') was a developer. Both parties entered into an agreement to develop the land for both commercial and residential purposes ('development agreement') which agreement was supplemented ('the supplemental agreement'). Pursuant to an agreement executed on the same date as the development agreement, the second and third defendants, directors and shareholders of the first defendant, agreed to guarantee the first defendant's performance of the development agreement ('performance guarantee'). An irrevocable power of attorney ('the first PA') in favour of the first defendant valid for the duration of the development agreement was granted by the plaintiff to give it power, on behalf of the plaintiff, to do what was necessary to implement the development of the land as provided in cls. 1 to 18 thereof. A supplemental power of attorney ('second PA') was also executed following the execution of the supplemental agreement. At the time when the said agreements and instruments were executed, the said land was charged to Public Bank. Irresolvable disputes arose between the parties in the implementation of the said agreements which led to the filing of the suit by the plaintiff in the High Court for, *inter alia*, a declaration that the development agreement had expired on 22 August 2016, that it was terminated on the said date and that the appellant would enter and take possession of the land with all the improvements. The defendants, on the other hand, counterclaimed, *inter alia*, for a declaration that there was wrongful termination of the development agreements and for monetary losses amounting to RM20,647,820. The suit ended in victory for the plaintiff but that decision was reversed by the Court of Appeal upon a

successful appeal by the defendants. This court granted the plaintiff leave to appeal against the aforesaid decision on two questions (i) where the plaintiff's pleaded case was based on a breach of contract, was he barred from seeking a declaration of the court that the contract had been terminated; and (ii) where there was an error in a document central to the case, did the party have to take up a separate action or separate suit for rectification, or could the court correct the error through the process of interpretation of the contract in the course of the trial.

Held (allowing appeal)
Per Rhodzariah Bujang FCJ delivering the judgment of the court:

(1) The existence of a statutory remedy is no bar to an action for a declaration. The general principle is that the jurisdiction of the High Court is not to be taken away without express words and this includes an action for a declaration. All that a declaration does is to declare the rights of the parties. The plaintiff was obviously seeking not just that declaratory order but damages for breach of contract which it was entitled to once that declaration was made and by virtue of s. 41 of the Specific Relief Act 1950, it would be to its detriment if it failed to ask for damages arising from that breach. Thus, the answer to the first leave question was in the negative. (paras 18, 19 & 26)

(2) The defendants submitted that the alleged error in cl. 1.1 of the supplemental agreement was not a clear mistake or a typographical one and therefore a separate action for rectification of the document was necessary. From the clear wordings of s. 30 of the Specific Relief Act 1950, the court is seized with jurisdiction to rectify such an instrument. The issue was whether such power must only be exercised in a specific suit or legal action for that purpose, as decided by the Court of Appeal. This court was unable to agree with that judicial stand because firstly, that strict requirement was not stipulated in the said section as the word 'may' is used. Secondly, the fact that the error was labelled a 'mutual mistake' and not a clear mistake, did not disentitle this court to apply the principle in *Nittan (UK) Ltd v. Solent Steel Fabrication Ltd* for a mistake which was mutual was on an even or a higher footing than a clear mistake which warranted a rectification by the court. Applying the legal maxim of *falsa demonstratio non nocet*, the conduct of the defendant in applying for the extension of time from the plaintiff was the added justification in favour of the plaintiff to say that the mistake was not just mutual but clear as well. Therefore, this court answered the second legal poser in the negative in favour of the plaintiff. (paras 32 & 33)

(3) Both the agreements did not stipulate the mode of termination. The plaintiff's notice to re-enter was good enough to serve that purpose and consequentially, the said termination was lawful. To summarise, what this court had decided above basically was to give effect to what the parties themselves had agreed in their agreements as to the particular event that gave rise to the right to terminate and the consequences following such termination. (paras 38 & 39)

Bahasa Melayu *Headnotes*

Perayu ('plaintif') adalah pemilik berdaftar sebidang tanah ('tanah') sementara responden pertama ('defendan pertama') adalah pemaju. Kedua-dua pihak memasuki perjanjian untuk memajukan tanah untuk tujuan komersial dan kediaman ('perjanjian pembangunan') yang mana perjanjian itu diberikan tambahan ('perjanjian tambahan'). Berdasarkan perjanjian yang dilaksanakan pada tarikh yang sama dengan perjanjian pembangunan, defendan kedua dan ketiga, pengarah-pengarah dan pemegang-pemegang saham defendan pertama, bersetuju untuk menjamin pelaksanaan perjanjian pembangunan defendan pertama ('jaminan pelaksanaan'). Surat kuasa wakil tidak boleh batal ('SK pertama') berpihak pada defendan pertama adalah sah selama perjanjian pembangunan diberikan oleh plaintif untuk memberi kuasa, bagi pihak plaintif, untuk melakukan apa yang diperlukan untuk melaksanakan pembangunan tanah seperti yang diperuntukkan dalam kl. 1 hingga 18. Surat kuasa wakil tambahan ('SK kedua') juga dilaksanakan setelah pelaksanaan perjanjian tambahan. Pada saat perjanjian dan instrumen tersebut dilaksanakan, tanah tersebut dipajak kepada Public Bank. Perselisihan yang tidak dapat diselesaikan timbul antara pihak-pihak dalam pelaksanaan perjanjian tersebut yang menyebabkan pemfailan guaman ini oleh plaintif di Mahkamah Tinggi untuk, antara lain, perisytiharan bahawa perjanjian pembangunan telah tamat pada 22 Ogos 2016, bahawa perjanjian itu ditamatkan pada tarikh tersebut dan bahawa perayu akan memasuki dan mengambil alih tanah dengan semua penambahbaikan. Sebaliknya, defendan menuntut, antara lain, untuk perisytiharan bahawa terdapat penamatan perjanjian pembangunan yang tidak sah dan untuk kerugian wang berjumlah RM20,647,820. Guaman itu berakhir dengan memihak kepada plaintif tetapi keputusan itu dibatalkan oleh Mahkamah Rayuan atas rayuan defendan-defendan. Mahkamah ini memberi kebenaran kepada plaintif untuk merayu terhadap keputusan tersebut atas dua soalan-soalan berikut (i) apabila kes yang diplidkan oleh plaintif berdasarkan pelanggaran kontrak, adakah plaintif dilarang daripada memohon perisytiharan mahkamah bahawa kontrak itu telah ditamatkan; dan (ii) jika terdapat kesalahan dalam dokumen yang menjadi asas kes tersebut, adakah pihak tertentu harus mengambil tindakan berasingan atau tuntutan berasingan untuk pembetulan, atau dapatkah mahkamah memperbaiki kekhilafan tersebut melalui proses pentafsiran kontrak semasa perbicaraan dijalankan.

Diputuskan (membenarkan rayuan)
Oleh Rhodzariah Bujang HMP menyampaikan penghakiman mahkamah:

(1) Kewujudan remedi statutori tidak melarang tindakan untuk perisytiharan. Prinsip umum adalah bahawa bidang kuasa Mahkamah Tinggi tidak boleh disangkal tanpa kata-kata yang jelas dan ini termasuk tindakan untuk perisytiharan. Apa yang dilakukan oleh perisytiharan adalah untuk menyatakan hak pihak-pihak. Plaintif jelas tidak hanya memohon perintah perisytiharan itu tetapi memohon ganti rugi atas pelanggaran kontrak yang plaintif berhak memperoleh setelah perisytiharan itu dibuat dan berdasarkan s. 41 Akta Relief Spesifik 1950, akan merugikannya jika plaintif gagal memohon ganti rugi yang timbul dari pelanggaran tersebut. Oleh itu soalan kebenaran pertama dijawab secara negatif.

(2) Defendan menyatakan bahawa kesalahan yang didakwa dalam kl. 1.1 perjanjian tambahan bukanlah kesalahan yang jelas atau tipografi dan oleh itu satu tindakan yang berasingan untuk pembetulan dokumen adalah wajar. Dari kata-kata jelas s. 30 Akta Relief Spesifik 1950, mahkamah mempunyai bidang kuasa untuk membetulkan instrumen tersebut. Isunya adalah sama ada kuasa tersebut hanya boleh digunakan dalam satu tuntutan spesifik atau tindakan undang-undang untuk tujuan itu, seperti yang diputuskan oleh Mahkamah Rayuan. Mahkamah ini tidak bersetuju dengan pendirian kehakiman itu kerana pertama, syarat ketat itu tidak ditetapkan dalam bahagian tersebut kerana perkataan 'boleh' digunakan. Kedua, kenyataan bahawa kesalahan itu dilabel sebagai 'kesilapan bersama' dan bukan kesalahan yang jelas, tidak melarang mahkamah ini dari mengguna pakai prinsip dalam *Nittan (UK) Ltd v. Solent Steel Fabrication Ltd* kerana kesalahan yang saling berlaku adalah sama atau berada pada kedudukan yang lebih tinggi daripada kesalahan yang jelas yang memerlukan pembetulan oleh mahkamah. Dengan mengguna pakai maksim undang-undang *falsa demonstration non nocet*, tingkah laku defendan dalam memohon perlanjutan masa daripada plaintif adalah justifikasi tambahan yang memihak kepada pihak plaintif untuk mengatakan bahawa kesalahan itu tidak hanya kesalahan bersama tetapi kesalahan jelas juga. Oleh itu, mahkamah ini menjawab soalan undang-undang kedua secara negatif dan berpihak pada plaintif.

(3) Kedua-dua perjanjian tersebut tidak menetapkan cara penamatan. Notis plaintif untuk masuk kembali adalah cukup baik untuk memenuhi tujuan tersebut dan akibatnya, penamatan tersebut adalah sah. Sebagai kesimpulan, apa yang diputuskan oleh mahkamah ini pada dasarnya adalah untuk memberi kesan pada apa yang telah dipersetujui oleh pihak-pihak itu sendiri dalam perjanjian mereka mengenai peristiwa tertentu yang menimbulkan hak untuk membatalkan dan akibat-akibat setelah penamatan berlaku.

Case(s) referred to:

Abram Steamship Co Ltd v. Westville Shipping Co Ltd [1923] AC 773 ***(refd)***
Adamastos Shipping Co Ltd v. Anglo-Saxon Petroleum Co Ltd [1958] 1 All ER 725 ***(refd)***
Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821 CA ***(refd)***
Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd [2011] 7 CLJ 121 FC ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Chartbrook Limited v. Persimmon Houses Limited [2009] 4 All ER 677 ***(refd)***
Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***
Dumford Trading AG v. OAO Atlantrybflot [2005] EWCA Civ 24 ***(refd)***
Hardwick v. Hardwick [1873] LR 16 Eq 168 ***(refd)***
Hungerford Investment Trust Limited (in Voluntary) v. Haridas Mundhra & Others [1972] AIR 1826 ***(refd)***
Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 AU ER 98 ***(refd)***
Juara Serata Sdn Bhd v. Alpharich Sdn Bhd [2015] 9 CLJ 37 FC ***(refd)***
Menta Construction Sdn Bhd v. Lestari Puchong Sdn Bhd [2015] 8 CLJ 1117 FC ***(refd)***
Ng Siew Wah & Ors v. MAA Holdings Sdn Bhd & Anor [1985] 1 LNS 37 SC ***(refd)***
Nittan (UK) Ltd v. Solent Steel Fabrication Ltd [1981] 1 Lloyd's Rep 633 ***(foll)***
Noor Azman Azemi v. Zahida Mohamed Rafik [2019] 3 CLJ 295 FC ***(refd)***
Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Paramaha Enterprise Sdn Bhd & Ors v. The Government Of The State Of Sabah & Anor [2015] 2 CLJ 268 CA ***(refd)***
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***
Tiarasetia Sdn Bhd v. Yayasan Selangor & Anor [2012] 1 LNS 1019 CA ***(refd)***
Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board [1973] 1 WLR 601 ***(refd)***
YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***
Zulkiflee Abdul Samad & Ors v. Segi Objektif (M) Sdn Bhd [2016] 1 LNS 1488 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 56(1)
Courts of Judicature Act 1964, ss. 25, 78, 96(a)
Rules of Court 2012, O. 15 r. 16
Specific Relief Act 1950, ss. 30, 41

For the appellant - Frank KH Tang, Leong Hsin Ru & John Sim; M/s Tang & Partners
For the respondents - Clement Wong Teck Hoo & Then Siaw Lian; M/s Clement & Co Advocs

[Editor's note: For the Court of Appeal judgment, please see KNK Development Sdn Bhd & Ors v. Sumbangan Aneka Sdn Bhd [2019] 10 CLJ 822 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Rhodzariah Bujang FCJ:

[1] At all material times of this appeal, the appellant was the registered proprietor of a parcel of land described as Lot 532, Block 9, Bukar-Sadong
B Land District whilst the first respondent, was a developer. On 18 October 2012, both parties entered into an agreement to develop the land for both commercial and residential purposes ("development agreement"), which agreement was supplemented ("the supplemental agreement") about two years later on 24 September 2014. Pursuant to an agreement executed on the
C same date as the development agreement, the second and third respondents who were directors and shareholders of the first respondent agreed to guarantee the first respondent's performance of the development agreement ("performance guarantee"). An irrevocable power of attorney ("the first PA") in favour of the first respondent valid for the duration of the development agreement was granted by the appellant to give it power, on
D behalf of the plaintiff, to do what was necessary to implement the development of the land as provided in cls. 1 to 18 thereof. A supplemental power of attorney ("second PA") was also executed following the execution of the supplemental agreement. At the time when the said agreements and instruments were executed, the said land was charged to Public Bank.
E Irresolvable disputes arose between the parties in the implementation of the said agreements which led to the filing of the suit by the appellant in the High Court for, *inter alia*, a declaration that the development agreement had expired on 22 August 2016, that it was terminated on the said date and that the appellant would enter and take possession of the land with all the
F improvements. The respondents, on the other hand, counter claimed, *inter alia*, for a declaration that there was wrongful termination of the development agreements and for monetary losses amounting to RM20,647,820. The suit ended in victory for the appellant but that decision was reversed by the Court of Appeal upon a successful appeal by the respondents. On 26 July 2019, this
G court granted the appellant leave to appeal against the aforesaid decision on these two questions:

> (i) Where the plaintiff's pleaded case is based on a breach of contract, is he barred from seeking a declaration of the court that the contract has been terminated; and
>
> H (ii) Where there is an error in a document central to the case, does the party have to take up a separate action or separate suit for rectification, or can the court correct the error through the process of interpretation of the contract in the course of the trial.

[2] We would start our consideration and determination of the leave
I questions by first outlining the salient terms of the written agreements and the respective decisions of the courts below. In doing so and for the rest of our judgment, parties would be referred to as they were in the High Court.

Entitlements In The Agreement

[3] It is not disputed that the central issue which is at the heart of the legal squabble of the parties is whether, as alleged by the plaintiff, that the development agreement had expired and/or lawfully terminated or was it as contended by the defendants, been brought to an unlawful end by the plaintiff's own repudiation of the same when it gave notice of intention to re-enter the land on 26 August 2016. That issue rests solely on the timelines provided in the supplemental agreement in respect of the plaintiff's entitlement to both the residential and commercial units to be built on the land, which numbered 21 ("the plaintiff's entitlement"). That entitlement is governed by cl. 12 of the development agreement which reads in full as follows:

> 12. COMPLETION OF THE LANDOWNER'S ENTITLEMENTS
>
> 12.1. The Developer shall at its own cost and expense complete the construction of the Landowner's entitlements within a period of *Thirty Six (36) months* from the date on which the said amended building plan have been approved by the relevant authorities (hereinafter called "*the said completion date*"). "Completion" shall mean when the appointed Architect has certified the completion of the buildings in accordance with the approved building plan and specifications by issuing the Certificate of Practical Completion of the building (s).
>
> 12.2. If the Developer shall fail to physically complete the Landowner's entitlements on or before the completion date, the Landowner shall upon request by the Developer grant the Developer a grace period of SIX (6) months to complete the same provided that the Developer shall be liable to pay the Landowner agreed pre-estimated liquidated damages of *Ringgit Malaysia Five Hundred Only (RM500.00) per month for each of the Landowner's entitlements in respect of the residential houses and Ringgit Malaysia One Thousand Only (RM1,000.00) per month each for the commercial shophouses* as long as they remain incomplete. The agreed pre-estimated liquidated damages shall be paid by the Developer to the Landowner on the last day of each month of the said grace period. *If the Developer shall fail to complete any of the Landowner's entitlements upon the expiration of this grace period, the Landowner shall be entitled to terminate this agreement*, and it is hereby agreed that the Landowner shall be entitled to forfeit all the improvement work that may have been done by the Developer on the said Land as agreed pre-estimated liquidated damages and thereafter neither parties shall have any claim against one another. (emphasis added).

[4] The building plan mentioned in cl. 12.1 was approved on 21 February 2013. In the supplemental agreement, the clause on the above-mentioned entitlement is cl. 1.1. This all-important clause defining the obligation of the first defendant with respect to the plaintiff's entitlements, is reproduced below with cl. 1 for completeness and they read as follow:

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1. In consideration of the Landowner agreeing to grant a Supplemental Power of Attorney deleting the 36 months time frame in the Power of Attorney *vide* Instrument No. L8080/2012, the Landowner and the Developer hereby agrees to the following:

1.1. In the event that the Developer fails to complete the landowner's entitlements **on or before 20 August 2016** (unless time extended by the **Developer**), the Landowner shall:

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(a) Terminate the Development Agreement, whereby

(i) The Landowner shall forfeit all improvement(s) works done on the said Land; and

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(ii) For all units sold by the Developer, the rights pertaining to the Sale and Purchase Agreement(s) between the Developer and the buyers shall be assigned to the Landowner. For purpose of this sub-clause, upon the execution of this Supplementary Agreement, the Developer shall execute a Novation Agreement (in escrow) for all the Sale and Purchase Agreements(s) between the Developer and respective buyers. Novation Agreement (in escrow) shall be deposited with the Landowner's solicitors and only to be dated and stamped if the Development Agreement is terminated. For any units to be sold by the Developer after the date of this Supplemental Agreement, the Developer shall execute a Novation Agreement in escrow and deposited with the Landowner's solicitors; and

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(A copy of the Novation Agreement is annexed and marked "A")

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(i) All Novation Agreement shall be returned to the Developer by the Landowner's solicitors upon all the Landowner's entitlements have been delivered to the Landowner; and

(ii) The said Land shall be returned to the Landowner; and

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(iii) The Landowner shall continue in the construction and development of the said Land, in which all proceed thereafter shall belong to the Landowner; and

(iv) The Landowner may claim against the Developer for any losses arising from the failure to complete the Development.

(emphasis added)

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[5] As noted by the learned Judicial Commissioner (as she then was), the plaintiff's entitlement was not completed by 20 August 2016 as stipulated above. In fact the first defendant knew even before the aforesaid date that it was unable to meet the stipulated deadline and thus by a letter dated 7 December 2015 written on its behalf by their then solicitor, Messrs Thai Advocates, it requested in para. 9 thereof for an extension of time, and that is worded in the following words:

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> 9. Further, Clause 1.1 of the Supplemental Agreement stipulates that the time for completion may be extended by the Developer and thus forth, the developer reserved the right to extend the time to complete the Landowner's entitlements. The construction works on the Landowner's entitlements are in progress and despite the aforementioned shortcomings, the Developer has not neglected to proceed with construction works as envisaged under the Development agreement.
>
> Having said the above, *we would be much obliged if this matter can be resolved amicably and that the Landowner will graciously grant the Developer a further extension of time beyond 20.08.2016 in order for the Developer to complete the Landowner's entitlements.* (emphasis added)

[6] That application was rejected by the plaintiff's then solicitor, Messrs Sia, Alvin Wong and Partners in its letter dated 9 May 2016 wherein in para. 8 thereof, it states as follows:

> (8) Please be informed that the Grace Period for the completion of all Landowner's entitlement shall be on **20.8.2016**. Thereafter, the Landowner reserved its right under the Development agreement and Supplemental Agreement. (emphasis added)

[7] The first defendant continued its quest for that extension of time by penning another letter from its then solicitor dated 11 July 2016 with the reasons stated therein and coaching that quest in the following words but which request was again rejected by the plaintiff:

> In view of the aforesaid, we trust both your client and your goodself are able to honour the terms of the supplementary agreement (previously drafted by your goodself) by agreeing IN WRITING the said extension required by our client due your client's undeniable delays throughout the course of this agreement.
>
> TAKE NOTICE that should your client objects or fails to agree to the extension of time, our client shall take necessary action to claim for all losses and damages suffered.

[8] The above correspondences between solicitors acting for the parties actually also alluded to their respective client's reasons for the delay which, in view of the leave questions are not material to the outcome of this appeal. However for the sake of completeness, they would summarily be mentioned now. The first defendant contended, *inter alia*, that it was the plaintiff's failure to partially redeem the charge with the bank within 14 days from the receipt of the notice of confirmation of sale from the first defendant as provided by cl. 3.3 of the development agreement despite numerous reminders for it to do so and failing to grant an irrevocable PA within the time frame under cl. 3.4 read with cl. 9 of the development agreement but instead giving it a lifespan of only 36 months. These failures contended the first defendant resulted in the end-financiers refusing to release progress payments to the first defendant which consequentially affected its ability to perform its obligations under the agreement. The plaintiff of course denied

the said allegations and in answer to the redemption issue, it referred, *inter alia*, to the bank's letter of disclaimer confirming that the units under first defendant entitlement as stipulated in the said letter are free from any redemption amounts and were not subject to foreclosure proceedings. As for the PA issue, the plaintiff's answer was that the first defendant was represented by their own solicitor during negotiations leading to the execution of the development agreement, the PAs as well as the supplemental agreement.

Judgment of The High Court

[9] The learned Judicial Commissioner framed the issues before her as follows:

(i) on who had the right to extend the completion date under the agreement;

(ii) on the termination or expiry of the agreement; and

(iii) on the loss and damages claimed by the plaintiff.

[10] For the first issue, the learned Judicial Commissioner found that the said cl. 1.1 expressly retained the right of the plaintiff to terminate the agreement and given the said right, Her Ladyship said:

> ... it did not make any commercial or common sense at all that the right to extend the time for completion of the Plaintiff's Entitlements would be vested in the first defendant. If it were true, surely it would render the plaintiff's right mere illusory as the first defendant could always extend the time if they were unable to complete the Plaintiff's Entitlements by 20.8.2016?. In fact, wouldn't such interpretation leave it open for the first defendant to extend the completion date indefinitely?

[11] Her Ladyship also alluded to the fact that the first defendant's own advocate's letters dated 7 December 2015 and 11 July 2016, which we had referred to earlier, also requested for an extension of time which contradicted its own assertion that it need not do so as that decision was theirs to make. The word "developer" in the impugned phrase, concluded the learned Judicial Commissioner, was a typographical error which error is not "totally alien to contractual disputes", citing *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 AU ER 98 and *Ng Siew Wah & Ors v. MAA Holdings Sdn Bhd & Anor* [1985] 1 LNS 37; [1985] 2 MLJ 332.

[12] In respect of the second issue, the learned Judicial Commissioner noted that cl. 12.2 of the development agreement and cl. 1.1 of the supplemental agreement vest the right to terminate the said agreements with the plaintiff though it did not include any terms specifying how such termination may be made or communicated. However, Her Ladyship found that the effect of the notice of intention to re-enter the land dated 26 August 2016 issued by the plaintiff was a termination of both the agreements since it had informed the first defendant that it was not agreeable to any further

extension. That power to terminate, said Her Ladyship, had been validly exercised. As for the second and third defendants, upon the first defendant's failure to complete the plaintiff's entitlement within the prescribed time, they were not discharged from the guarantees executed by them. Thus, the learned Judicial Commissioner ordered the counter claim of the defendants to be dismissed.

[13] On the last issue, the learned Judicial Commissioner granted the following reliefs to the plaintiff:

(i) Upon a declaration that the agreement had expired on 22 August 2016 and or had been terminated, the first defendant was ordered to pay the plaintiff a sum of RM17,442,330 being proceeds of sales of the first defendant's entitlements to third parties.

(ii) That the first defendant is not entitled to the units of its entitlements as specified in the agreement.

(iii) That the first, second and third defendants, jointly and severally, pay the plaintiff RM7,806,485.10 being the cost to complete the development on the land and pre-estimated liquidated damages under cl. 12.2 of the agreement.

(iv) That the first defendant pay the plaintiff RM22,887.84 being the undisputed amount reimbursable under cl. 2 of the development agreement.

[14] The learned Judicial Commissioner did not grant prayers (b) and (c) of the plaintiff's statement of claim which was for all sales of the first defendant's units to third parties under the agreement be assigned to the plaintiff or alternatively all such sales to be set aside as this would amount to a miscarriage of justice to purchasers of such units who were not parties to the action.

Judgment Of The Court Of Appeal

[15] In its judgment, the Court of Appeal allowed the appeal of the defendants premised on these grounds:

(i) The learned Judicial Commissioner erred in granting the aforesaid declaratory order because such order is a discretionary relief which falls under the Specific Relief Act 1950 whereas the plaintiff's claim is for reliefs pursuant to a breach of contract, which is a substantive right under the Contracts Act 1950. Such a declaratory order should not have been granted because the contract, in particular cl. 1.1 which was in the first defendant's favour, was disputed in material forms. The alleged error in cl. 1.1 should not be labelled as a typographical one and to be amended orally by looking at other documents and/or conduct of the parties which the learned Judicial Commissioner did. Instead, the

A mistake should first be rectified. Thus, the principles in *Ng Siew Wah*'s case (*supra*) do not apply because the rectification of cl. 1.1 is substantive in nature in that it anchors a substantive defence of the defendant.

(ii) The principle established in *Nittan (UK) Ltd v. Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633 does not apply to the factual matrix of this case for the reasons as stated above.

[16] Our determination of the leave questions, would start with parties' submissions and for ease of reference these leave questions would be reproduced as headings in our judgment.

C *Where The Plaintiff's Pleaded Case Is Based On A Breach Of Contract, Is He Barred From Seeking A Declaration Of The Court That The Contract Has Been Terminated?*

[17] Learned counsel for the plaintiff submitted that the judgment of the Court of Appeal is erroneous on these four grounds:

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(i) the three cases it cited that is, *Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd* [2011] 7 CLJ 121; *Zulkiflee Abdul Samad & Ors v. Segi Objektif* (M) Sdn Bhd [2016] 1 LNS 1488 and *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821 do not support the grounds given for its decision not to grant declaratory judgment;

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(ii) it is a standalone judgment which conflicts with a line of previous Court of Appeal decisions;

(iii) it conflicts with s. 25 of the Courts of Judicature Act 1964 and O. 15 r. 16 of the Rules of Court 2012; and

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(iv) the Court of Appeal failed to appreciate that the nature of the declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs.

[18] Although we would have to agree, after perusing the three cited cases G in detail that their respective *ratio* is not about prohibiting the granting of a declaratory order for a breach of contract claim, but in fairness to the Court of Appeal, the said cases were cited, it would appear to us from the excerpts of the said judgments reproduced in its judgment, particularly in the first two cited cases, that it was to stress the point that a declaratory order is a H discretionary relief and only to be granted when the conditions as stipulated in the respective judgments are met. Of course as listed in para. 22 of learned counsel for the plaintiff's written submission, there is a number of Court of Appeal's decision where such a declaratory order had been granted when the claims were based on breach of contract (see, *inter alia*, *Tiarasetia Sdn Bhd v. Yayasan Selangor & Anor* [2012] 1 LNS 1019 and *Paramaha Enterprise Sdn Bhd & Ors v. The Government Of The State Of Sabah & Anor* [2015] 2 CLJ 268, I both of which were also in respect of development agreements). There is

therefore ample authority in support of the legal position canvassed by him and which we must say we fully endorsed. As rightly pointed out by the plaintiff's counsel, the stand of the court all these years, as held by Raja Azlan Shah Ag CJ (Malaya) in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 is firstly, the existence of a statutory remedy is no bar to an action for a declaration, that the general principle is that the jurisdiction of the High Court is not to be taken away without express words and this includes an action for a declaration.

[19] Secondly, all that a declaration does is to declare the rights of the parties. The availability of this discretionary relief where the cause of action lies in contract, as pointed out by the plaintiff's counsel has been stressed in the following publications:

(i) The Declaratory Judgment by *Zamir & Woolf* where at para 1 – 02 it states that the court may declare that a contract to which the claimant is a party has or has not been determined.

(ii) *Law of Contract* by Cheshire and Fifoot at p. 583 where it states that a party who accepts the discharge of the contract by breach may fortify his position in this respect by taking up proceedings for a declaration that the contract is terminated.

(iii) *Equity, Doctrines & Remedies* by Meaghar, Gummow and Lehane at para. 19-075 where it states that a declaration can be made that a breach of contract has occurred or that a contract has been terminated.

[20] In addition to the above authorities, we also noted that the House of Lords in *Abram Steamship Co Ltd v. Westville Shipping Co Ltd* [1923] AC 773 had held that obtaining a verdict from the court to enforce a right to rescind a contract does not terminate the contract and restores the antecedent status for that verdict is merely a judicial determination that the plaintiff's election to rescind the contract was justified. This decision was followed by the Indian Supreme Court in *Hungerford Investment Trust Limited (in Voluntary) v. Haridas Mundhra & Others* [1972] AIR 1826 which held that:

> A court generally adjudicates upon the antecedent rights of the parties. When a court adjudges rescission of a contract or a decree, it is only concerned with the question whether the person rescinding it was justified in doing so. The court does not create any right which parties did not possess when it makes a declaration that a contract has been validly rescinded.

[21] Learned counsel for the defendants' primary stand is that the said leave questions are merely ancillary to the main issue which is whether the termination of the agreements was lawful and that the said questions are not based on the findings made by the Court of Appeal. In respect of the first question, learned counsel submitted that the Court of Appeal only held that

A the declaratory relief sought is "discretionary but should not be exercised if the plaintiff's claim is for breach of contract" but did not rule that the plaintiff is barred from seeking the said order, only that this was not a fit and proper case for doing so when it states in para. 7 of its judgment as follows:

> [7] **The facts of this case** will also show that the court **should not have** granted the declaratory prayers as the contract **that the plaintiffs were relying on was disputed in material form in respect of a particular clause where it was in favour of the defendant**. (emphasis added)

Therefore, submitted learned counsel further, we should not even have to answer the said leave question, citing this court' decision in *Noor Azman Azemi v. Zahida Mohamed Rafik* [2019] 3 CLJ 295; [2019] 3 MLJ 141.

[22] We find it appropriate to pause now to mention that in respect of the second leave question, learned counsel did not advance any reason why it should not similarly be answered because after laying out the relevant facts and clauses in the supplemental agreement as well the pleadings on it and the judgments of the lower courts, learned counsel in para. 54 of his written submission said this:

> 54. Be that as it may, we humbly submit that the real issue between the parties herein is whether the termination of the Development agreement by the Plaintiff is lawful. The first and second Questions are merely ancillary to the real and main issue. Therefore, in order to achieve justice of this case, we will invite this Honourable Court to look into the real issue of the case, ie, the legality of the termination by the Plaintiff. This case must be carefully and holistically examined as the outcome would indirectly affect the faith of 57 *bona fide* purchasers of the Development.

[23] We have, said learned counsel further, power to decide on this issue on the legality of the termination so as, in the words of Gopal Sri Ram JCA in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 at p. 113, to do complete justice according to the substantial merits of a particular case and even to avoid miscarriage of justice as held in *YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337. He also pointed out that deciding an appeal without answering leave questions which had been granted was even done in *Juara Serata Sdn Bhd v. Alpharich Sdn Bhd* [2015] 9 CLJ 37; [2015] 6 MLJ 773.

[24] Nonetheless, for the sake of completeness, learned counsel did submit on the merits of the leave questions. In respect of the first question, he submitted that from the clear wordings of s. 41 of the Specific Relief Act 1950 "it can be seen that the intention of a declaratory order is to cater for instances where no further relief or other relief can be sought for. It is not to supplement or support further reliefs like what was done by the plaintiff

in our case herein". Therefore, he said, since the plaintiff had pleaded breach of contract as its cause of action, the declaratory order sought is obsolete and superfluous as it is meant to be the last resort when there is no other remedy.

[25] With due respect to learned counsel, we are not persuaded to depart from the view we expressed earlier on this first leave question based on the reasonings he gave above for we simply could not agree that is the effect of the said s. 41. This is because the proviso to that section clearly provides that a plaintiff who is able to seek for further relief other than a mere declaration but did not do so disentitles the court from granting him that declaration. For the sake of clarity, that section reads:

> 41. Discretion of court as to declaration of status or right
>
> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> **Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so**. (emphasis added)

[26] The plaintiff before us was obviously seeking not just that declaratory order but damages for breach of contract which it was entitled to once that declaration is made and by virtue of the aforesaid proviso, it would be to its detriment if it failed to ask for damages arising from that breach. Thus, our answer to the first leave question is in the negative.

Where There Is An Error In A Document Central To The Case, Does The Party Have To Take Up A Separate Action Or Separate Suit For Rectification, Or Can The Court Correct The Error Through The Process Of Interpretation Of The Contract In The Course Of The Trial

[27] The court's power to correct a misnomer when construing a document was pronounced by the English Court of Appeal in *Nittan*'s case (*supra*) where Lord Denning MR held at p. 637 as follows:

> In this court we are very used to dealing with misnomers. We do not allow people to take advantage of a misnomer when everyone knows what was intended. I will only refer to one authority, *Whittam v. W. J. Daniel & Co. Ltd.,* [1962] 1 Q.B. 271 at p. 277, where Lord Justice Donovan cited the words of Lord Justice Devlin:
>
> *I think that the test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me, but they have got my name wrong", then there is a case of mere misnomer.* (emphasis added)

More pertinent to the case before us is what was said by Brightman LJ in the same case at p. 639:

> In my opinion, in construing a document, the court is at liberty, as a matter of construction, to correct a misnomer. *A misnomer is not, in my view, necessarily a mistake which requires the equitable remedy of rectification. The misnomer may be a mere clerical error. A simple example would be the use in a conveyance of the expression "the vendor" where clearly "the purchase purchaser" was intended*. It is not necessary to rectify the conveyance to enable it to be read and take effect as the parties plainly intended.
>
> (emphasis added)

[28] The above principle was applied by our Supreme Court in *Ng Siew Wah*'s case (*supra*) where Mohamed Azmi SCJ quoted with approval the above passage from Brightman LJ's judgment. With the greatest of respect to the Court of Appeal, its reasoning that the principle established in *Nittan*'s case (*supra*) does not apply to the factual matrix of this case because it is not a clear mistake, for the defendant's defence would collapse if it were treated as such and that rectification in this case is substantive in nature and anchors the defence is simply erroneous. The obviousness of the mistake itself from the factual matrix of a case is the criteria. The dispute whether it is one or not, is not the consideration for as seen in the cases cited above and numerous others on the same issue, one of the parties to the proceedings was contending that it was not a mistake. In other words and to rephrase Lord Denning's words quoted above the principle consideration to be given is whether, that other party was trying to take advantage of the misnomer.

[29] Applying the principle in *Nittan*'s case (*supra*), learned counsel for the plaintiff submitted that it is clear from cl. 1.1 that the approving party being referred to is the landowner which, as found by the learned Judicial Commissioner is supported by the first defendant's own conduct at that material time in asking for extension of time from it. To say otherwise would, said learned counsel further, leads to commercial absurdity because the first defendant would then be able to indefinitely extend time to complete the plaintiff's units, thus rendering the completion date of 20 August 2016 meaningless.

[30] That submission of his has support from the House of Lords in *Chartbrook Limited v. Persimmon Houses Limited* [2009] 4 All ER 677 when it opined as follows when the court construes whether the error is a misnomer:

> Although the courts did not readily accept that linguistic mistakes were made in formal contracts, *where the background and context drove the court to conclude that something had gone wrong with the language in a contract, the law did not require the court to attribute to the parties an intention which a reasonable person would not have understood them to have had*. Where there was a clear mistake in the contract and it was clear what correction ought to be made

in order to cure the mistake on the basis of what a reasonable person would have understood the parties to have meant, then the court was entitled to correct the mistake as a matter of construction.

(emphasis added)

[31] Alternatively, submitted learned counsel further, the maxim of *falsa demonstratio non nocet* applies to correct the said error. It is a legal maxim which means that a false description does not void a document if the intent is clear and the mistake is obvious. This maxim had been applied by the English Courts in, *inter alia*, *Dumford Trading AG v. OAO Atlantrybflot* [2005] EWCA Civ 24 and *Adamastos Shipping Co Ltd v. Anglo-Saxon Petroleum Co Ltd* [1958] 1 All ER 725. In applying this maxim, the court is allowed to consider extrinsic facts to look at "the whole thing fairly" to see "what are leading words of description" said Lord Selborne LC in *Hardwick v. Hardwick* [1873] LR 16 Eq 168.

[32] As for learned counsel for the defendants, he submitted that the alleged error in cl. 1.1 of the supplemental agreement is not a clear mistake or a typographical one as found by the Court of Appeal and therefore a separate action for rectification of the document is necessary. He referred to paras. 4.1 and 4.3 of the plaintiff's reply to the defence and defence to counterclaim where the plaintiff referred to the said alleged error as being occasioned by a "mutual mistake" and that since it was not a clear error, as decided by this court in *Menta Construction Sdn Bhd v. Lestari Puchong Sdn Bhd* [2015] 8 CLJ 1117, it cannot be corrected by way of construction of the document but by rectification. This, submitted learned counsel further, is in line with the provision of s. 30 of the Specific Relief Act 1950 which provides as follows:

30. When instrument may be rectified

When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, **may institute a suit to have the instrument rectified**: and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value. (emphasis added)

[33] Obviously, from the clear wordings of the said section, the court is seized with jurisdiction to rectify such an instrument, which is the agreement in this case. The issue is whether such power must only be exercised in a specific suit or legal action for that purpose as decided by the Court of Appeal. Again, with much due respect to the Court of Appeal, we are unable to agree with that judicial stand because for one, that strict requirement is not stipulated in the said section as the word "may" is used. Secondly, with due respect to learned counsel for the defendant, the fact that the error was

labelled a "mutual mistake" and not a clear mistake in the plaintiff's pleading, does not disentitle us to apply the principle in *Nittan*'s case (*supra*) for a mistake which is mutual is on an even, or we would even be prepared to say, a higher footing than a clear mistake which warrants a rectification by the court. A clear mistake that error is, for as rightly held by the learned Judicial Commissioner and submitted by learned counsel for the plaintiff, it makes for commercial absurdity to leave such a power in the hands of the developer. Applying the above-mentioned and the said legal maxim of *falsa demonstratio non nocet*, the conduct of the defendant in applying for the extension of time from the plaintiff is the added justification in favour of the plaintiff to say that the mistake was not just mutual but clear as well. Therefore, based on the considerations above, we would equally answer the second legal poser in the negative in favour of the plaintiff.

[34] However, learned counsel for the defendant submitted that our task does not end here because as we had stated earlier, he said in essence we have a corollary issue to determine if the termination of the agreement was lawful. He submitted that the plaintiff had no such right to terminate because there was no total failure of consideration given that 57 units had been completed and 21 units were in progress at that material time and besides the rights of *bona fide* purchasers would be affected by the termination. The learned Judicial Commissioner, said the defendant's counsel, had taken a simplistic approach by automatically allowing the termination on account of the non-extension of the six months grace period when there was not even a notice of termination issued by the plaintiff. Learned counsel relied on this court's decision in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 where it was held, by referring to s. 40 and s. 56(1) of the Contracts Act 1950 that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration. Otherwise, held in this court, the innocent party could only claim damages. Learned counsel for the defendant however conceded that this issue of total failure of consideration was never submitted before the learned Judicial Commissioner and although it was in the Court of Appeal, the same was not considered by it.

[35] Learned counsel for the plaintiff took a strong objection against this proposed additional task because that issue does not fall within s. 96(a) of the Courts of Judicature Act 1964. The court's power to deal with matters outside of the leave questions granted in order to do complete justice only arises, as provided in the said section, if the question to be answered by the court arose from the decision of the High Court exercising its original jurisdiction or from the decision of the Court of Appeal which has raised a question of law of general principle not previously decided by this court. Obviously, and we have no cause to disagree with him, this was not the case

here. Further the case of *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51 is clear on this legal impediment against the respondent.

[36] Be that as it may and in any event, for the sake of argument, we do accept the fact that indeed there had been some performance of the agreement, the details and percentage of that performance had been outlined in paras. 17 to 23 of the reply submission of the plaintiff's counsel which we see no necessity to repeat here. We also noted the decision of this court in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257 on this issue of consideration which held in paras. 59 and 60 as follows:

> *[59] In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar*. We are inclined to take the view that minimal works such as getting development permission orders or taking possession over the land for development purposes may not in most instances fall on the same side as *Berjaya Times Square Sdn. Bhd* (*supra*). This is simply because such an interpretation does not make commercial sense. What good is a mere foundation of any office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety.
>
> *[60] In fact in Berjaya Times Square Sdn Bhd (supra), it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works*. (See: *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666; *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 LNS 213; *Law Ngei Ung & Anor v. Tamansuri Sdn Bhd* [1989] 2 CLJ 181; [1989] 2 CLJ (Rep) 44); . As such the principle should therefore be this. There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but no in the latter instance. (emphasis added)

[37] However, in our view the factual matrix of this case have convinced us that the decisions of this court in the two above-mentioned cited cases have no application to the parties herein because of again the clear intentions of the parties as evinced in the said cl. 1.1 of the supplemental agreement. Further, when we read the *Berjaya Times Square*'s case (*supra*) and *Damansara Realty*'s case (*supra*) there was no mention of a like specific event agreed by the parties which triggers termination of the agreement and the remedy available upon termination of the agreements executed by the parties as spelt out in the said cl. 1.1.

[38] Furthermore, it is obvious from the existence of the said cl. 1.1 and the conduct of the plaintiff in refusing flat out an extension of the time prescribed thereunder that time is the essence of the contract. Therefore, as held in *Damansara Realty*'s case (*supra)*, quoting learned author Cheong May Fong in *Civil Remedies in Malaysia*, Sweet & Maxwell Asia, 2007 at p. 38, s. 56(1) of the Contracts Act 1950 applies and the contract between the parties is voidable. That being the case, the plaintiff being an innocent party has the option to terminate the contract. Section 56(1) provides:

> 56. **Effect of failure to perform at fixed time, in contract in which time is essential.**
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract.

Since in the case before us, both the agreements do not stipulate the mode of termination, we would agree with the learned Judicial Commissioner that the plaintiff's notice to re-enter is good enough to serve that purpose and consequentially, the said termination was lawful.

[39] To summarise, what we have decided above basically is to give effect to what the parties themselves have agreed in their agreements as to the particular event that gives rise to the right to terminate and the consequences following such termination. In this regard it is pertinent to reproduce what was held by the House of Lords in *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 which was quoted by this court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464:

> *The court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable*. An unexpressed term can be implied if and only if courts finds that the parties must have intended that term to form part of their contract. (emphasis added)

[40] It is with this sage advice in mind that we would not only allow the appeal with costs but also affirm the whole of decision of the learned Judicial Commissioner on the reliefs granted to the plaintiff. This we do even though the order proposed by the plaintiff in the original para. 13(b) of its memorandum of appeal appears to be a fairer alternative but which learned

counsel for the plaintiff applied on the date of hearing of the appeal to amend by deleting and substituting it with an order that the decision of the learned Judicial Commissioner be reinstated *in toto*. For the record, the said original paragraph before amendment reads as follows:

> 13. Therefore, the Appellant humbly prays that its appeal be allowed with costs here and below and that:
>
> (a) ...
>
> (b) the orders of the HC be reinstated except for the following which ought to be disallowed/varied in the **interest of justice**:
>
> (i) prayer (d) of the Appellant's Statement of Claim be disallowed;
>
> (ii) prayer (f) of the Appellant's Statement of Claim be allowed only in respect of the first Respondent's unsold entitlement units under the said Development Agreement; and
>
> (c) such other orders be made by the FC accordingly as justice requires.
>
> (emphasis added)

[41] What the plaintiff originally intended before the amendment is explained in its counsel's written submission at para. 93(b) thereof, the clarity of which is self-evident and which is why we would reproduce the same below:

> (b) the HC's judgment allowing the Plaintiff's claim and dismissing the Defendant's counterclaim be reinstated except for 3 orders which ought to be disallowed/varied in the interests of justice. These 3 orders are:
>
> (i) Prayer (d) of the Plaintiff's Statement of Claim - "further or in the alternative, all monies received by the First Defendant from third parties from the sales of the First Defendant's entitled units be paid to the Plaintiff" – *ought to be disallowed and substituted with an order that the First Defendant shall be liable to complete the construction of the First Defendant's sold entitlement units and indemnify the Plaintiff against all claims from the third parties arising therefrom*:
>
> (ii) Prayer (e) of the Plaintiff's Statement of Claim - "the Plaintiff would enter and take possession of the said land with all the improvements" – ***o****ught to be varied to exclude the First Defendant's sold entitlement units****;*** and
>
> (iii) Prayer (f) of the Plaintiff's Statement of Claim – "declaration that the First Defendant is not entitled to the Developer's entitled units under Development Agreement" – *ought to be varied to be in respect of the First Defendant's unsold entitlement units only*. (emphasis added)

[42] We have decided to incorporate the above quotations with the hope (which may just be wishful thinking on our part) that in spite of our ultimate decision above, parties would still be open to explore a win-win situation for their legal predicament but which option is closed to us in view of the application of the law to the facts of this case.

[43] As a postscript to this unanimous decision of ours, we wish to add that the delivery of its summary on 26 April 21 was done pursuant to s. 78 of the Courts of Judicature Act 1964 as Azahar Mohamed CJM was indisposed on the said date. This fact was made known to the parties before the said summary was read out in the technology court where the court proceeding was held.